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No. 89-1691

In The

Supreme Court of the United States

October Term, 1989

SERENA DUNN, et al.,

Petitioners,

v.

THE FLORIDA BAR, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE FLORIDA BAR AND ITS PRESIDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHEN A CIVIL RIGHTS PLAINTIFF CLASS, SEEKING TO ESTABLISH A CONSTITUTIONAL RIGHT TO CONSULT WITH NON-LAWYERS FOR ASSISTANCE IN OBTAINING A MARRIAGE DISSOLUTION, UNILATERALLY DETERMINES TO DISMISS ITS LAWSUIT AND SEEKS ATTORNEYS' FEES AS A PREVAILING PARTY PURSUANT TO 42 U.S.C.§ 1988, CAN THE TRIAL COURT DENY FEES BECAUSE THE CLASS' CLAIMS HAVE NO COLORABLE CONSTITUTIONAL BASIS.

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STATEMENT OF THE CASE

Respondents The Florida Bar and its President ("the Bar") adopt the Statement of the Case of Respondent, the Supreme Court of Florida, with the following additions.

Petitioners' third amended complaint sought to enjoin the Florida Supreme Court and the Bar from prohibiting in any way non-lawyers from aiding petitioners in obtaining a dissolution of marriage. The Bar moved to dismiss petitioners' complaint, contending that (1) the action was barred by the Eleventh Amendment; (2) the complaint failed to allege a deprivation of any constitutional right because it alleged no more than that the Bar, by carrying out its mandate from the Florida Supreme Court to prohibit non-lawyers from dispensing legal advice, violated an alleged "fundamental right" of the plaintiff class to receive legal advice from legally untrained persons; (3) the petitioners had no constitutional right to counsel in dissolution proceedings, *e.g.*, *Lassiter v. Department of Social Services of Durham County*, 452 U.S.18 (1981); therefore, they certainly had no constitutional right to consult with non-lawyers; and (4) the only cases relied upon by petitioners to support their constitutional claim, *Boddie v. Connecticut*, 401 U.S.371 (1971), and *Johnson v. Avery*, 393 U.S.483 (1969), could not be extended to establish a constitutional right of petitioners to consult with non-lawyers in dissolution proceedings. The trial court denied the Bar's motion to dismiss in a one-line opinion, without citing any reason.

Following class certification, the Bar also moved for summary judgment under the doctrine of *Hicks v. Miranda*, 422 U.S.332, 344 (1975), that a dismissal of an appeal

by this Court for want of a substantial federal question is a determination of the merits of the case and binding precedent for lower courts presented with the same issue. In *Furman v. The Florida Bar*, 444 U.S.1061 (1980), this Court had dismissed an appeal from the decision of the Florida Supreme Court, *The Florida Bar v. Furman*, 376 So.2d 378 (Fla.1979) "for want of a substantial federal question." Under *Hicks*, this Court's dismissal in *Furman* was an adjudication on the merits of the constitutional issues presented in that appeal and established binding Supreme Court precedent on those issues. The Bar contended that because the constitutional issues raised by petitioners in this case (represented by Alan Morrison, Esquire, who was also counsel in the *Furman* case), are identical to those decided adversely to their position by this Court in the *Furman* case, the trial court was bound by this Court's prior decision. The trial court denied the motion for summary judgment.

Thereafter, the trial court set the case for trial. However, before the case could be tried and before the trial court had any opportunity to rule on the merits of the constitutional issues presented, petitioners *unilaterally* decided to *voluntarily* dismiss the action with prejudice, without receiving any relief on the merits of their claim. The petitioners did so, they say, because they believed that a rule change adopted by the Florida Supreme Court had given them "substantially all the relief which they had sought. . . . " However, Mr. Morrison testified at the attorneys' fee hearing that the Bar never agreed that petitioners were prevailing parties as a result of the rule change. Indeed, Mr. Morrison testified that he did not notify the Bar's counsel of his participation in the Florida

Supreme Court rulemaking process and that "in hindsight," he probably should have.

Thus, contrary to the numerous statements in petitioners' petition, this case was never "settled." Rather, petitioners unilaterally determined to voluntarily dismiss the case, and respondents certainly did not object. In the stipulation of dismissal, respondents were careful to make clear that they were not agreeing that petitioners were prevailing parties or that petitioners had obtained the relief which they sought. Because of petitioners' decision to voluntarily dismiss the case, the trial court was never required to decide the merits of petitioners' constitutional claims, and respondents never had an opportunity to appeal the trial court's denial of their motion to dismiss and motion for summary judgment.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

Petitioners contend that in determining whether petitioners were prevailing parties under 42 U.S.C.§ 1988, the court of appeals "in practical effect required petitioners to show that they would have prevailed had the case been litigated to judgment, rather than concluded by stipulated dismissal" (Pet.10),[1] and that this holding is in

[1] References to "Pet. ___" are to the Petition for Writ of Certiorari.

conflict with those of other courts of appeals and of this Court. In fact, the court of appeals' analysis expressly eschews such an approach and applies the *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir.1978), two-prong test which is in accord with the decisions of other courts of appeals and this Court. In cases such as this, where there has been no judicial determination of the merits of plaintiffs' claim, the courts have almost universally adopted the analysis of *Nadeau* for determining prevailing party status.[2] [3]

The *Nadeau* analysis requires that two tests be met. First, a plaintiff must establish that the lawsuit was causally linked to securing the relief obtained,[4] and second, that the defendant's conduct in response to the lawsuit was required by law. "If it has been judicially determined that the defendants' conduct, however beneficial it may

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[2] In determining whether a party is entitled to an award of attorneys' fees under 42 U.S.C.§ 1988, a court must make a threshold determination of whether the party is a "prevailing party." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, ___ U.S. ___, 109 S.Ct.1486, 1491 (1989).

[3] The circuits expressly adopting the *Nadeau* two-prong test are listed by the respondent, Supreme Court of Florida, in its brief in opposition (hereinafter "Opposition"), and will not be repeated here. *See* Opposition at 20-21. Moreover, petitioners themselves recognize *Nadeau* as the "leading case" on this issue (Pet.12, n.3).

[4] The respondents have adamantly contended that the plaintiff class is in no better position than it was prior to the filing of the suit and, therefore, that no relief has been obtained. Moreover, the respondents have consistently contended that this lawsuit was not the "catalyst" for any relief obtained by the plaintiff class, a position rejected by the court of appeals (Pet.8(a)-12(a)).

be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau*, 581 F.2d at 281. Stated otherwise, the defendant's conduct must be other than a "wholly gratuitous response to an action that in itself was frivolous and groundless." *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir.1982); *Nadeau*, 581 F.2d at 281.

Almost all of the circuits have expressly adopted the *Nadeau* test, and although the actual verbal expression of the test has been honed by the various courts of appeals, the gist and the effect of the test remain the same. Whether the test is described as "required by law" or "not frivolous, nor groundless," or "constituting a colorable constitutional claim," the courts of appeals are requiring that there be some legal basis for a claim before a plaintiff is entitled to attorneys' fees.

This does not mean that a plaintiff must show that he would have prevailed had the case been litigated to judgment. The "legal inquiry does not entail full trial on the merits. Rather, the trial court need only consider whether the plaintiff's claim is "frivolous, unreasonable or groundless." *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir.1982) (quoting *Nadeau v. Helgemoe*, 582 F.2d 275, 281 (1st Cir.1978), and *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 422 (1978)).

Petitioners seek to make much of the trial court's denial of respondents' motions to dismiss and for summary judgment. However, these rulings, in and of themselves, do not make petitioners "prevailing parties." *See Hewitt v. Helms*, 482 U.S.755, 107 S.Ct.2672, 2675 (1987)

("[t]he most that [plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made").

In *Nadeau*, the court recognized that the argument could be made that the "court cannot meaningfully decide the legal requirements that govern defendants' conduct without conducting the very trial the consent decree was designed to avoid," but rejected that concern, stating, "we believe the court has had sufficient exposure to the facts and law of this case to determine, whether if plaintiffs had continued to press their claims under traditional constitutional theory, their action could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' " *Nadeau*, 581 F.2d at 281 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 422 (1978)).

The approach taken by the Eleventh Circuit in this case mirrors the approach taken by *Nadeau*, and is in line with other circuits and decisions of this Court. Nowhere in its holding did the court of appeals imply that the appropriate test for determining whether petitioners were entitled to attorneys' fees required petitioners to show they would have prevailed had the case been litigated to judgment. In fact, noting *Garcia v. Guerra*, 744 F.2d 1159, 1162-63 (5th Cir.1984), *cert. denied*, 471 U.S.1065 (1985), the Eleventh Circuit explicitly recognized:

> "The second prong of the *Leatherbury* test, consequently, does not require appellants to show that they would have won on the merits. Rather, as the *Leatherbury* case said, appellants need only show that the action taken by the

> appellees was 'not a wholly gratuitous response to an action that in itself was frivolous or groundless.' A claim is not frivolous if it is arguably supported by case or statutory law" (citations omitted) (Pet.12(a), 13(a)).

The practical effect of the Eleventh Circuit's ruling was to require petitioners to show a basis in law for their claim. The court of appeals, being very careful not to suggest that the novelty of petitioners' claim compelled its defeat, correctly concluded that "[n]o stretch of logic can extend those holdings [*Boddie v. Connecticut*, 401 U.S.371 (1971); *Johnson v. Avery*, 393 U.S.483 (1969), and *Bounds v. Smith*, 430 U.S.817 (1977)] to the case before us now" (Pet.17(a)). In other words, the petitioners' claim cannot be arguably supported by case or statutory law.

To hold other than the court of appeals did would result in an anomalous situation where a plaintiff would only have to *allege* a civil rights violation to satisfy the second prong of the *Nadeau* test and thereby be entitled to fees, without regard to whether the allegation had any basis in law. As the purpose of 42 U.S.C.§ 1988 is to vindicate civil rights *violations*, not civil rights *allegations*, such a rule would be in direct contravention of the intent of Congress in enacting the statute.

II.

THE DECISION BELOW IS IN ACCORD WITH THE PURPOSE OF 42 U.S.C.§ 1988 AND PRIOR DECISIONS OF THIS COURT

Congress, in recognizing that " 'a vast majority of the victims of civil rights violations cannot afford legal counsel [and] are unable to present their cases to the courts,' "

enacted the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"); H.R.Rep.No.1558, 94th Cong., 2d Sess.1, *reprinted in* 1976 U.S.Code Cong.& Admin.News 5910. *See Long v. Bonnes*, 455 U.S.961, 967 (1982) (Rhenquist, J., joined by O'Connor, J., dissenting from denial of certiorari). In keeping with the dictates and purpose of 42 U.S.C.§ 1988, before attorneys' fees can be awarded, a determination must be made as to whether the claimant is indeed a "prevailing party." *Texas State Teachers Ass'n*, 109 S.Ct. at 1491; *Hewitt v. Helms*, 482 U.S.755 (1987). Implicit in that determination is the question of whether the benefit to the plaintiff was required by law.

Often, a judicial determination on the merits of the claim has already been made (through a final judgment, summary judgment or the like), and the inquiry need go no further. However, when no judicial determination has been made on the merits of plaintiff's claim and the defendant contends that no constitutional or statutory basis for plaintiff's claim exists, the court must analyze the claim to determine, not whether the plaintiff would have won on the merits, but whether the action taken by the defendant was required by law and not gratuitous. The court of appeals properly applied the second prong of the *Nadeau* test to make that determination and correctly concluded that petitioners had not demonstrated that the respondents' conduct was required by law.

Any other result would be contrary to the purpose of 42 U.S.C.§ 1988 and to common sense. The Act was not meant to create a windfall for attorneys who press forward with nonmeritorious claims (*i.e.*, claims not supported by statutory or case law), even if some change in

conduct on the part of the defendant is prompted by such litigation.[5]

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT IMPAIR THE PUBLIC POLICY FAVORING SETTLEMENTS

Petitioners claim that the decision of the Eleventh Circuit will "undermine the longstanding, and increasingly important, public policy favoring settlement and other forms of extra-judicial dispute resolution" (Pet.14).

Petitioners' argument is faulty for two reasons. First, it unfairly implies that the case at hand was resolved through a settlement. *There was no settlement in this case.* This case was resolved after petitioners voluntarily dismissed the action with prejudice, unilaterally claiming that a subsequent change in the rules regulating The Florida Bar had satisfied their claim (Pet.7(a), 8(a)). At the time of the dismissal, respondents never agreed that the petitioners were prevailing parties as a result of the rule change and vigorously contested petitioners' "prevailing party" status throughout the proceedings.

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[5] Contrary to petitioners' position (Pet.13-14), this Court's decision in *Maher v. Gagne*, 448 U.S.122 (1980), does not support petitioners' argument. *Maher* involved a civil rights suit which was resolved by settlement, whereas, contrary to petitioners' attempts to characterize this case as having been "settled," it was petitioners' unilateral decision to voluntarily dismiss the case which terminated this litigation. Moreover, the constitutional claims at issue in *Maher* had been previously held by the trial court and the court of appeals to be colorable.

Second, as noted by the court in *Nadeau*,

> "[T]he argument cuts both ways. If defendants may refuse to settle a case and accept the cost of continued litigation to avoid paying attorney's fees, it is equally likely that plaintiffs' counsel, rather than receive no compensation at all for their efforts, would be willing to continue the litigation on the chance that they might cut if not eliminate their losses. We cannot decide this issue based on such honest but speculative concerns." *Nadeau*, 581 F.2d at 282.

If the Eleventh Circuit had awarded petitioners' attorneys' fees without first inquiring whether petitioners' claims had any basis in statutory or case law, the court of appeals would be, in effect, encouraging the filing of nonmeritorious civil rights claims. On the other hand, if the court of appeals had denied attorneys' fees solely on the ground that there had been no judicial determination on the merits of plaintiff's claim, the court of appeals would be, in effect, discouraging resolution of the dispute before a full trial on the merits. The *Nadeau* test, as applied by the Eleventh Circuit in this case, "strikes the proper balance between rewarding the filing of wholly frivolous lawsuits on the one extreme and, on the other extreme, withholding fees unless the plaintiff's claim is fully evaluated on the merits." Johnston, 691 F.2d at 286.

The decision of the court of appeals below is consistent with public policy favoring settlements. Any other result would create an imbalance in competing but equally important interests.

IV.

THE DECISION OF THE COURT OF APPEALS DOES NO DAMAGE TO THE "CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III, SECTION 2 OF THE CONSTITUTION

Petitioners assert that the decision below may potentially damage the principle that federal courts sit to decide "cases" or "controversies" because, in deciding the attorneys' fees question, the court of appeals issued an advisory opinion rejecting petitioners' constitutional claim (Pet.15-16).

Petitioners propose that instead of issuing an advisory opinion, the court of appeals should have simply inquired into whether petitioners' claim was frivolous (Pet.16). In effect, that is exactly what the court of appeals did (Pet.12(a)-13(a)). The court of appeals quoted directly from *Garcia*, 744 F.2d at 1163, where that court recognized that a decision on the merits of the appellants' claim was not required and that appellants need only show that the action taken by the appellees was "not a wholly gratuitous response to an action that in itself was frivolous and groundless" (quoting *Leatherbury*, 672 F.2d at 551). The *Garcia* court stated that a claim is not frivolous if it is arguably supported by case or statutory law. *Id.* at 1163. The analysis of the Eleventh Circuit is in accord with the analysis used by other courts of appeals in similar cases and, interestingly enough, is in accord with petitioners' own proposed standard.

The court of appeals described its task this way:

> *"[W]e must examine prior case and statutory law, not only to ascertain their holdings and text, but to*

> *examine their ramifications, and to determine to our own satisfaction that the Constitution could not, under even the most expansive of interpretations, lend color to appellants' claim"* (Pet.15(a) (emphasis added)).

After examining the decisions relied on by petitioners, the Eleventh Circuit concluded that none of the cases arguably supported petitioners' claim (Pet.16(a)).

To suggest that the court of appeals could do any less in a case where there has been no judicial determination on the merits is to suggest that attorneys' fees be automatically awarded in cases where the dispute is terminated (by voluntary dismissal or otherwise) before judgment. It would also enable a civil rights plaintiff to rob the court of appeals of any meaningful review in a civil rights fee case where the trial court has denied a motion to dismiss or motion for summary judgment. For, under petitioners' formulation, these preliminary rulings by the trial court *ipso facto* mean their claim is "colorable," thereby entitling them to fees. Such a rule would be an illogical and overly simplistic approach to awarding fees under 42 U.S.C.§ 1988.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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